



# Courting the People: Demosprudence and the Law/Politics Divide

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COURTING THE PEOPLE:  
DEMOSPRUDENCE AND THE LAW/POLITICS DIVIDE

*This is a draft of the short law review article "Courting the People"  
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America's first black President signed his first major piece of legislation on January 29, 2009: the Lilly Ledbetter Fair Pay Act.<sup>2</sup> Since the Act carried Lilly Ledbetter's name, she fittingly stood beaming by President Obama's side during the signing ceremony.<sup>3</sup> For nineteen years, however, this seventy-year-old grandmother had less reason to be joyful, working in supervisory blue-collar jobs in a Goodyear Tire and Rubber plant in Gadsden, Alabama, earning fifteen to forty percent less than her male counterparts. This pay gap, which resulted from receiving smaller raises than the men, "added up and multiplied" over the years.<sup>4</sup> But Ledbetter did not discover the disparity until she was nearing retirement and "only started to get hard evidence of discrimination when someone anonymously left a piece of paper" in her mailbox listing the salaries of the men who held the same job.<sup>5</sup> Ledbetter sued and a federal jury awarded her \$223,776 in back pay and more than \$3 million in punitive damages, finding that it was "more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex."<sup>6</sup> The Supreme Court nullified that verdict. The five-Justice majority held that Ledbetter waived her right to sue by failing to file her complaint within 180 days of the first act of discrimination.<sup>7</sup> In Ledbetter's words, the Court "sided with big business. They said I should have filed my complaint within six months of Goodyear's first decision to pay me less, even though I didn't

know that's what they were doing."<sup>8</sup> By contrast, the Lilly Ledbetter Fair Pay Act sided with ordinary working women across the nation.

Justice Ruth Bader Ginsburg, on behalf of herself and three colleagues, dissented from the Court's May 2007 decision.<sup>9</sup> A leading litigator and advocate for women's equality before taking her seat on the Court,<sup>10</sup> Justice Ginsburg read her dissent aloud from the bench—an act that, in her own words, reflects “more than ordinary disagreement.”<sup>11</sup> Her oral dissent, which made the front page of the *Washington Post*,<sup>12</sup> signaled that something had gone “egregiously wrong.”<sup>13</sup> In a stinging rebuke to the Court majority, she used the personal pronoun, speaking not to her colleagues but directly to the other “you’s” in her audience—women who, despite suspecting something askew in their own jobs, were reluctant to rock the boat as the only women in all-male positions:

Indeed initially you may not know the men are receiving more for substantially similar work. . . . If you sue only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the Court's threshold for suing too late.<sup>14</sup>

Justice Ginsburg's dissent reflected an acute sense, missing from the majority's opinion, of the circumstances surrounding women in male-dominated workplaces. In a job previously filled only by men, women “understandably may be anxious to avoid making waves.”<sup>15</sup>

Justice Ginsburg was *courting* the people.<sup>16</sup> Her oral dissent and subsequent remarks hinted at a democratizing form of judicial speech that, were it heard, could be easily understood by those outside the courtroom.<sup>17</sup> By speaking colloquially—using the personal pronoun “you” to address her audience—Justice Ginsburg signaled to ordinary women that the majority should not have the last word on the meaning of pay discrimination. Her goal was to engage an external audience in a conversation about our country's commitment to equal pay for equal work.<sup>18</sup>

While Justice Ginsburg spoke frankly to and about the Lilly Ledbetters of the world, her real target was the legislature. Appalled by the Court's “cramped interpretation” of a congressional statute to justify its decision nullifying the favorable jury verdict, Justice Ginsburg explicitly stated

that the “ball again lies in Congress’s court.”<sup>19</sup> During a public conversation in September 2008, then-Harvard Law School Dean Elena Kagan asked Justice Ginsburg to describe her intended audience in *Ledbetter*. Ginsburg replied: “[I]t was Congress. Speaking to Congress, I said, ‘You did not mean what the Court said. So fix it.’”<sup>20</sup>

Democrats in Congress responded quickly. Initially called the Fair Pay Restoration Act, the House-passed bill would have eliminated the Court-sanctioned time limit.<sup>21</sup> That bill, however, died in the Senate, where Republicans—including John McCain—publicly denounced it.<sup>22</sup>

As the initial Fair Pay Restoration Act languished in Congress, Lilly Ledbetter emerged as a real presence in the 2008 election campaign.<sup>23</sup> Despite her initial misgivings about partisan campaigning, she was infuriated by John McCain’s refusal to support a congressional fix. She cut an ad<sup>24</sup> for Barack Obama that had a “stratospheric effect” when poll-tested by Fox News’s political consultant Frank Luntz.<sup>25</sup> In August 2008, Ledbetter was a featured speaker at the Democratic National Convention in Denver.<sup>26</sup> There, as well as in her testimony before Congress, she acknowledged the significance of Justice Ginsburg’s dissent both in affirming her concerns and in directing attention to a legislative remedy.<sup>27</sup>

In her testimony before Congress, for example, Ledbetter echoed Justice Ginsburg’s emphasis on the isolation many women feel when they first integrate the workplace.<sup>28</sup> Both Ledbetter and Justice Ginsburg used the pronoun “you” to speak directly to other women. At the same time that Ledbetter’s story animated Justice Ginsburg’s dissent, Justice Ginsburg’s dissent amplified Ledbetter’s own voice. Suitably emboldened, this Alabama grandmother went before Congress to speak directly to women about their shared fears of making waves in a male-dominated environment:

Justice Ginsburg hit the nail on the head when she said that the majority’s rule just doesn’t make sense in the real world. “You can’t expect people to go around asking their coworkers how much they are making. Plus, even if you know some people are getting paid a little more than you, that is no reason to suspect discrimination right away.

Especially when you work at a place like I did, where you are the only woman in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along.”<sup>29</sup>

Justice Ginsburg also continued to engage in a more public discourse about the *Ledbetter* case and her role as an oral dissenter. In an October 2007 speech posted on the Supreme Court website, she parodied the majority's reasoning: “‘Sue early on,’ the majority counseled, when it is uncertain whether discrimination accounts for the pay disparity you are beginning to experience, and when you may not know that men are receiving more for the same work. (Of course, you will likely lose such a less-than-fully baked case.)”<sup>30</sup> As reframed by Justice Ginsburg, *Ledbetter*'s story was not about a negligent plaintiff who waited an unconscionably long time to sue; it was about an ordinary woman struggling to comprehend and eventually document the pay disparities in her all-male work environment. Justice Ginsburg frankly acknowledged the zigzag trajectory of change, especially given the real-world employment challenges such a woman faces. In “propel[ling] change,” her oral dissent had to “sound an alarm” that would be heard by members of Congress, Lilly Ledbetter, and women's rights advocates more generally.<sup>31</sup> Her dissent had “to attract immediate public attention.”<sup>32</sup>

Eventually social activists, legal advocacy groups, media translators, legislators, and “role-literate participants” (in Reva Siegel's terminology)<sup>33</sup> not only heard but acted upon the alarm bells Ginsburg sounded. Marcia Greenberger of the National Women's Law Center was one of those “role-literate participants” who helped carry Justice Ginsburg's message forward. Greenberger characterized Ginsburg's oral dissent as a “clarion call” to the American people “that the Court is headed in the wrong direction.”<sup>34</sup> Lilly Ledbetter became another such participant as her story, with Justice Ginsburg's assistance, helped ground and frame the discourse.<sup>35</sup> And for the first time in more than a decade, Congress pushed back against the Supreme Court. In January 2009, Lilly Ledbetter's name was enshrined in history when Congress passed and President Barack Obama signed the Lilly Ledbetter Fair Pay Act.<sup>36</sup>

In her *Ledbetter* dissent and subsequent remarks, Justice Ginsburg was courting the people to reverse the decision of a Supreme Court majority and thereby limit its effect. In Robert Cover’s “jurisgenerative” sense,<sup>37</sup> she claimed a space for citizens to advance alternative interpretations of the law. Her oral dissent and public remarks represented a set of *demosprudential* practices for instantiating and reinforcing the relationship between public engagement and institutional legitimacy.

In Justice Ginsburg’s oral dissent we see the possibilities of a more democratically oriented jurisprudence, or what Gerald Torres and I term *demosprudence*.<sup>38</sup> *Demosprudence* builds on the idea that lawmaking is a collaborative enterprise between formal elites—whether judges, legislators, or lawyers—and ordinary people. The foundational hypothesis of *demosprudence* is that the wisdom of the people should inform the lawmaking enterprise in a democracy. From a *demosprudential* perspective, the Court gains a new source of democratic authority when its members engage ordinary people in a productive dialogue about the potential role of “We the People” in lawmaking.<sup>39</sup>

*Demosprudence* is a term Professor Torres and I initially coined to describe the process of making and interpreting law from an external—not just internal—perspective. That perspective emphasizes the role of informal democratic mobilizations and wide-ranging social movements that serve to make formal institutions, including those that regulate legal culture, more democratic.<sup>40</sup> *Demosprudence* focuses on the ways that “the demos” (especially through social movements) can contribute to the meaning of law.

Justice Ginsburg acted *demosprudentially* when she invited a wider audience into the conversation about one of the core conflicts at the heart of our democracy.<sup>41</sup> She grounded her oral dissent and her public remarks in a set of *demosprudential* practices that linked public engagement with institutional legitimacy. Those practices are part of a larger *demosprudential* claim: that the Constitution belongs to the people, not just to the Supreme Court.

The dissenting opinions, especially the oral dissents, of Justice Ginsburg and other members of the Court are the subject of my 2008 Supreme Court foreword, *Demosprudence Through Dissent*.<sup>42</sup> The foreword was addressed

to judges, especially those speaking out in dissent, urging them to “engage dialogically with nonjudicial actors and to encourage them to act democratically.”<sup>43</sup> The foreword focuses on oral dissents because of the special power of the spoken word, but Justices can issue demosprudential concurrences and even majority opinions, written as well as spoken.<sup>44</sup> Moreover, true to its origins, demosprudence is not limited to reconceptualizing the judicial role. Lawyers and nonlawyers alike can be demosprudential, a claim that I foreshadow in the foreword and which Torres and I are developing in other work on law and social movements.<sup>45</sup>

Supreme Court Justices can play a democracy-enhancing role by expanding the audience for their opinions to include those unlearned in the law. Of the current Justices, Justice Antonin Scalia has a particular knack for attracting and holding the attention of a nonlegal audience. His dissents are “deliberate exercises in advocacy” that “chart new paths for changing the law.”<sup>46</sup> Just as Justice Ginsburg welcomed women’s rights activists into the public sphere in response to the Court majority’s decision in *Ledbetter*, Justice Scalia’s dissents are often in conversation with a conservative constituency of accountability.<sup>47</sup> By writing dissents like these, both Justices have acknowledged that their audience is not just their colleagues or the litigants in the cases before them. Both exemplify the potential power of demosprudential dissents when the dissenter is aligned with a social movement or constituency that “mobilizes to change the meaning of the Constitution over time.”<sup>48</sup> Thus, Justice Ginsburg speaks in her “clearest voice” when she addresses issues of gender equality.<sup>49</sup> Similarly, Justice Scalia effectively uses his originalist jurisprudence as “a language that a political movement can both understand and rally around.”<sup>50</sup> Both Justices Ginsburg and Scalia are at their best as demosprudential dissenters when they encourage a “social movement to fight on.”<sup>51</sup>

Robert Post, writing in this volume, reads my argument exactly right: “[C]ourts do not end democratic debate about the meaning of rights and law; they are participants within such debate.”<sup>52</sup> As Post explains, the “meaning of constitutional principles are forged within the cauldron of political debate,” a debate in which judges are often important, though not

necessarily central, actors.<sup>53</sup> Law and politics are in continuous dialogue, and the goal of a demosprudential dissenter is to ensure that the views of a judicial majority do not preempt political dialogue. When Justice Ginsburg spoke in a voice more conversational than technical, she did more than declare her disagreement with the majority's holding. By vigorously speaking out during the opinion announcement, she also appealed to citizens in terms that laypersons could understand and to Congress directly.<sup>54</sup> This is demosprudence.



## ENDNOTES

- 1 I thank Niko Bowie, Tomiko Brown-Nagin, Richard Chen, Andrew Crespo, Jean-Claude Croizet, Christian Davenport, Pam Karlan, Jennifer Lane, Jane Mansbridge, Martha Minow, Janet Moran, Robert Post and Gerald Torres for their invaluable contributions to this essay.
- 2 Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).
- 3 See Richard Leiby, *A Signature with the First Lady's Hand in It*, WASH. POST, Jan. 29, 2009, at C1 ("It seemed to be all about Lilly Ledbetter at the White House yesterday—her name was enshrined in history, affixed to the first piece of legislation signed by President Obama.").
- 4 *Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. 10 (2007) [hereinafter *Justice Denied?*] (statement of Lilly Ledbetter); see also Lilly Ledbetter, Address to the Democratic National Convention (Aug. 26, 2008) [hereinafter Ledbetter, Address] (transcript available at <http://www.demconvention.com/lily-ledbetter/>).
- 5 *Justice Denied?*, *supra* note 4, at 10. Ledbetter's salary was \$3,727 a month. The salary of the lowest-paid man, with far less seniority, was \$4,286. *Id.* at 12.
- 6 *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2178 (2007) (Ginsburg, J., dissenting) (quoting record from below).



- 7 *Id.* at 2165 (majority opinion).
- 8 Ledbetter, Address, *supra* note 3; *see also Justice Denied?*, *supra* note 4, at 10.
- 9 *Ledbetter*, 127 S.Ct. at 2178 (Ginsburg, J., dissenting).
- 10 In an interview with the ACLU, Ginsburg's cocounsel described the first case Ginsburg argued before the Court: "I've never heard an oral argument as unbelievably cogent as hers. . . . Not a single Justice asked a single question; I think they were mesmerized by her." *Tribute: The Legacy of Ruth Bader Ginsburg & WRP Staff*, Am. Civil Liberties Union, Mar. 7, 2006, <http://www.aclu.org/womensrights/gen/24412pub20060307.html>.
- 11 Justice Ruth Bader Ginsburg, The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_10-21-07.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_10-21-07.html)) [hereinafter Ginsburg, Eizenstat Lecture].
- 12 Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, Wash. Post, May 30, 2007, at A1 ("Speaking for the three other dissenting justices, Ginsburg's voice was as precise and emotionless as if she were reading a banking decision, but the words were stinging."). Barnes noted that Justice Ginsburg's oral dissent was a "usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women's rights." *Id.*
- 13 Ruth Bader Ginsburg, Celebration Fifty-Five: A Public Conversation Between Dean Elena Kagan '86 and Justice Ruth Bader Ginsburg '56-'58 at the Harvard Law School Women's Leadership Summit (Sept. 20, 2008) (from notes taken by and on file with author) [hereinafter Ginsburg, Leadership Summit]; *see also* Ginsburg, Eizenstat Lecture, *supra* note 10 ("A dissent presented orally . . . garners immediate attention. It signals that, in the dissenters' view, the Court's opinion is not just wrong, but importantly and grievously misguided.").
- 14 Oral Dissent of Justice Ginsburg at 4:25, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074), *available at* [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_1074/opinion](http://www.oyez.org/cases/2000-2009/2006/2006_05_1074/opinion); *see also* Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 40-41 (2008).
- 15 Oral Dissent of Justice Ginsburg, *supra* note 14, at 8:30-37; *see also* Guinier, *supra* note 14, at 41.

- 16 By “courting” I mean enlisting or inspiring rather than wooing or currying favor with.
- 17 Guinier, *supra* note 14, at 40.
- 18 Cf. Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 92 MINN. L. REV. (forthcoming 2009) (manuscript at 14, available at <http://black.wustl.edu/webfiles/announcements/johnson-black-ringsmuth-2009.pdf>) (finding that Supreme Court Justices use their oral dissents strategically to signal strong disagreement as well as the need for action by third parties to change the majority decision). As was her practice, Justice Ginsburg handed out her bench announcement right after the delivery of her oral dissent. Her press-release-style opening paragraphs in her opinions are intended to help reporters under tight deadlines get it right.
- 19 Oral Dissent of Justice Ginsburg, *supra* note 14, at 10:17-:58; see also Guinier, *supra* note 14, at 41 n.179.
- 20 Ginsburg, Leadership Summit, *supra* note 13.
- 21 H.R. 2831, 110th Cong. (2007).
- 22 The initial bill passed the House in July 2007 but never came up for a vote in the Senate. GovTrack, H.R. 2831: Lilly Ledbetter Fair Pay Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2831> (last visited Mar. 17, 2009). See also Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.
- 23 *Morning Edition: Fair Pay Law Strikes a Blow for Equal Pay* at 4:12 (National Public Radio broadcast Jan. 29, 2009), available at <http://www.npr.org/templates/player/mediaPlayer.html?action=1&t=1&islist=false&id=99995431&m=99995549> (describing Ledbetter’s prominent role and reporting that Ledbetter’s husband, a retired National Guard Sergeant Major, voted for a Democratic President for the first time in fifty years when he cast his ballot for Barack Obama).
- 24 In the ad, Ledbetter says, “John McCain opposed a law to give women equal pay for equal work. And he dismissed the wage gap, saying women just need education and training. I had the same skills as the men at my plant. My family needed that money.” *Id.* at 2:35-:58.
- 25 *Id.* at 3:07-:18.
- 26 Ledbetter, Address, *supra* note 4.
- 27 *Justice Denied?*, *supra* note 4, at 10.
- 28 *Id.* at 11.

- 29 *Id.* at 10; *see also* YouTube, Ledbetter v. Goodyear Equal Pay Hearing: Lilly Ledbetter, <http://www.youtube.com/watch?v=jRpYoUu5XH0> (last visited Mar. 10, 2009).
- 30 Ginsburg, Eizenstat Lecture, *supra* note 11, at 6.
- 31 *See id.* Justice Ginsburg's willingness to participate in a more expansive conversation is not entirely unexpected, given her view that conversation should run both ways. "If we don't listen we won't be listened to." Ginsburg, Leadership Summit, *supra* note 13.
- 32 Ginsburg, Eizenstat Lecture, *supra* note 11. *See also* Johnson, Black & Ringsmuth, *supra* note 18 (manuscript at 7-8).
- 33 Guinier, *supra* note 14, at 51; *see also* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323, 1339-48 (2006) [hereinafter Siegel, *Constitutional Culture*].
- 34 Mother Jones, Ginsburg's Famous White Gloves Finally Come Off, [http://www.motherjones.com/mojoblog/archives/2007/05/4556\\_ginsburgs\\_famou.html](http://www.motherjones.com/mojoblog/archives/2007/05/4556_ginsburgs_famou.html) (May 31, 2007, 22:19 PST) (quoting Marcia Greenberger).
- 35 Justice Ginsburg's dissent and Lilly Ledbetter's public statements converge on a common explanation for Ledbetter's delay in filing her lawsuit, an explanation that influenced both the media coverage and the Obama campaign's framing of the case. *See* Adam Liptak, *Justices Hear Bias Case on Maternity, Pensions, and Timing*, N. Y. TIMES, Dec. 11, 2008, at B7; Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N. Y. TIMES, Jan. 29, 2009, <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?hp>. Their mutually reinforcing explanation for Ledbetter's delay in filing her lawsuit, their joint outreach to Congress, and their success in sparking favorable media coverage of the new legislation became key talking points on conservative blogs. *See, e.g.*, Posting of Hans Bader to OpenMarket.org, <http://www.openmarket.org/2009/03/04/distorting-the-news-to-obamas-advantage/> (Mar. 4, 2009); Posting of Orin Kerr to Volokh Conspiracy, <http://volokh.com/posts/1236629897.shtml> (Mar. 9, 2009); Posting of Ed Whelan to Bench Memos, NATIONAL REVIEW ONLINE, <http://bench.nationalreview.com/post/?q=YzAoZjkiMzMzViMWUwMWNIYWwEZTkyYTIzYmYzMzAxYWE> (Mar. 9, 2009). Indeed, Lilly Ledbetter soon came to symbolize a populist message. Ledbetter not only was present at the signing ceremony for the bill named in her honor, but sat with First Lady Michelle Obama during President Obama's

first address to a joint session of Congress. Michael Falcone, *Guests of the First Lady, Reflecting Main Themes of the Speech*, N. Y. TIMES, Feb. 25, 2009, at A16.

- 36 The Act passed the Senate with “Yea” votes from every present Democrat and all four female Republicans. U.S. Senate Roll Call Votes 111th Congress—1st Session, S. 181 (Lilly Ledbetter Fair Pay Act of 2009), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00014](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00014) (last visited Mar. 17, 2009).
- 37 See generally Robert M. Cover, *The Supreme Court, 1981 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (conceptualizing the law as normative in nature).
- 38 See Lani Guinier & Gerald Torres, *Linked Fate: Toward a Jurisprudence of Social Movements* 1 (Sept. 17, 2006) (unpublished manuscript at 1, on file with author).
- 39 Guinier, *supra* note 14, at 48 (“The demosprudential *intuition* is that democracies, at their best, make and interpret law by expanding, informing, inspiring, and interacting with the community of consent, a community in constitutional terms better known as ‘we the people.’”).
- 40 See, e.g., Lani Guinier & Gerald Torres, *Changing the Wind: The Demosprudence of Law and Social Movements* (forthcoming 2013) (draft manuscript at 1, on file with author).

We coin the term demosprudence . . . as a critique of lawmaking that is historically preoccupied with moments of social change as if they occur primarily within an elite enterprise. Demosprudence is a philosophy, a methodology, and a practice that views lawmaking from the perspective of informal democratic mobilizations and disruptive social movements that serve to make formal institutions, including those that regulate legal culture, more democratic. Although democratic accountability as a normative matter includes citizen mobilizations organized to influence a single election, a discrete piece of legislation, or a judicial victory, we focus here on democratic responsiveness to popular, purposive mobilizations that seek significant, sustainable social, economic, and/or political change. In this lecture, therefore, we discuss demosprudence primarily as the jurisprudence of social movements. *Id.*

- 41 See *id.* (manuscript at 14).
- 42 Guinier, *supra* note 14.

- 43 *Id.* at 50; *see also id.* at 10 (describing Justice Breyer’s passionate oral dissent in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, where he “hinted at a new genre of judicial speech” that could resonate with a less educated audience were his oral dissent more widely distributed). Demosprudential dissents are those that 1) probe or question a particular understanding of democracy, 2) using an accessible narrative style to 3) reach out to an external audience—beyond the other Justices or litigants in the case. Guinier, *supra* note 14, at 51, 90-92, 95-96.
- 44 *Id.* at 52-56.
- 45 *Id.* at 102-07, 113 & nn.517-18.
- 46 *Id.* at 110.
- 47 *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).
- 48 Guinier, *supra* note 14, at 114.
- 49 *Id.*
- 50 *Id.*; *see also* Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191, 192 (2008) [hereinafter Siegel, *Dead or Alive*].
- 51 Guinier, *supra* note 14, at 112; *see also* Ginsburg, Eizenstat Lecture, *supra* note 10; *cf.* Siegel, *Dead or Alive*, *supra* note 50, at 196, 237-38.
- 52 *See* Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U.L.Rev. 581, 582 (2009).
- 53 *Id.*
- 54 My claim in the foreword that Justices, not just Justice Ginsburg, use their oral dissents strategically to appeal to third parties is consistent with the findings of a recent study by several political scientists. *See* Johnson, Black & Ringsmuth, *supra* note 18 (manuscript at 30-31).